

Immigration Practice Tips

Defense-Relevant Immigration News

by Manuel D. Vargas*

News on what may be deemed convictions for immigration purposes

First-time simple drug possession guilty plea vacated or expunged under state law not deemed a conviction in the 9th Circuit

The United States Court of Appeals for the 9th Circuit held that the new definition of “conviction” for immigration purposes does not apply to state court dispositions that vacate or expunge first-time simple drug possession pleas or findings of guilt. *Lujan-Armenariz v INS*, __ F3d __, 2000 WL 1051858 (8/1/00).

The 9th Circuit’s decision overruled the 1999 precedent decision of the Board of Immigration Appeals (BIA) that found deportable a noncitizen who had had his guilty plea to possession of a controlled substance vacated and his case dismissed upon termination of his probation under the laws of Idaho. See *Matter of Roldan-Santoyo*, Int Dec #3377 (BIA 1999) [*Backup Center REPORT*, Vol XIV, #3, at p. 6]. The Board had held that such a disposition counted as a conviction for immigration purposes under the new federal statutory definition of conviction provided at section 101(a)(48)(A) of the Immigration and Nationality Act (8 USC 1101[a][48][A]). The statute includes state court dispositions where adjudication of guilt has been withheld but where there has been a plea or finding of guilt, and some penalty or restraint ordered by the court.

In *Lujan-Armenariz*, the 9th Circuit found that the new definition of conviction for immigration purposes does not repeal the Federal First Offender Act. That law provides that a first-time simple drug possession case expunged under its provisions shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or for any other purpose. See 18 USC 3607. The 9th Circuit then found still in effect the rule requiring similar treatment for first-time simple drug possession offenses prosecuted and expunged under state laws. See *Gaberding v INS*, 30 F3d 1187 (9th Cir 1994), adopted by the BIA in *Matter of Manrique*, Int Dec 3250 (BIA 1995).

Noncitizen defendants should be warned, however, that immigration judges continue to be bound by the BIA’s decision in *Matter of Roldan-Santoyo* outside of the 9th Circuit. Therefore, New York State defense attorneys should continue to counsel noncitizen defendants that pleading guilty to a first-time drug offense—even if the plea may later be vacated under a drug treatment diversion program—continues to subject a noncitizen defendant to deportability or

* *Manuel D. Vargas* is the Director of NYSDA’s Criminal Defense Immigration Project, which provides backup support concerning immigration issues to public defense attorneys. Manny, who recently received NYSDA’s Service of Justice Award (see p. 1), wrote the Project manual, *Representing Noncitizen Criminal Defendants in New York State*, 2nd edition. He will be appearing at a number of local, regional, and national trainings in upcoming months. If you have questions about immigration issues in a criminal case, you can call the Project on Tuesdays and Thursdays from 9:30 a.m. to 4:30 p.m. at (212) 367-9104.

inadmissibility under current law outside of the 9th Circuit. Nevertheless, noncitizens who have such dispositions in their past, as well as those who cannot avoid such a disposition in a present or future case, should be made aware that in future immigration proceedings they should pursue any argument that their state disposition is analogous to a disposition under the Federal First Offender Act and therefore not a conviction for immigration purposes.

BIA panel finds conviction vacated under NYCPL 440 not a “conviction”

In an unpublished non-precedent decision, a BIA panel gave effect to a New York State court vacatur under Criminal Procedure Law 440 of a conviction for sexual abuse in the third degree, and terminated removal proceedings. *Matter of Rodriguez-Rivas*, No. A74 726 833 (BIA 6/22/00).

The Immigration and Naturalization Service (INS) had argued that the conviction was vacated for the purpose of avoiding removal, and not for reasons relating to a constitutional or legal defect in the criminal proceedings. Therefore, the INS contended, the vacatur should not be honored under the BIA’s precedent decision in *Matter of Roldan-Santoyo*, discussed above. *Roldan-Santoyo* found that “no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute.”

The BIA panel in *Matter of Rodriguez-Rivas* found, however, that CPL 440 is not an expungement statute or other rehabilitative statute. The panel would not go behind the state court judgment and determine whether the state court acted in accordance with its own state law. Rather, the BIA panel accorded “full faith and credit” to the state court judgment.

Some panels find certain youthful offender dispositions are not convictions

Another potential inroad into the BIA’s prior broad readings in *Matter of Roldan-Santoyo* of the new definition of conviction for immigration purposes is indicated by unpublished BIA decisions issued this year relating to certain New York youthful offender dispositions.

Based on *Matter of Roldan-Santoyo*, unpublished decisions issued by the BIA last year found New York youthful offender dispositions to be convictions for immigration purposes. See *Backup Center REPORT* Vol XIV #7, at p. 6. In *Matter of Roldan-Santoyo*, the BIA en banc had stated: “We . . . interpret the new definition to provide that an alien is considered convicted for immigration purposes upon the initial satisfaction of the requirements of section 101(a)(48)(A) of the Act, and that he remains convicted notwithstanding a subsequent state action purporting to erase all evidence of the original determination of guilt through a rehabilitative procedure.” Int. Dec. #3377 at pp. 14-15.

Nevertheless, at least two unpublished BIA decisions this year have found New York youthful offender dispositions not to be convictions for immigration purposes where the disposition at issue was deemed analogous to a juvenile delinquency adjudication under the Federal Juvenile Delinquency Act (FJDA). *Matter of Pinzon-Fajardo*, No. A73 568 322

(BIA 3/30/00); *Matter of Das*, No. A73 500 147 (BIA 1/13/00) (client represented by NYSDA member George Terezakis; *amicus* brief filed by NYSDA and the New York State Association of Criminal Defense Lawyers). The FJDA defines “juvenile delinquency” as “the violation of a law of the United States committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult.” 18 USC 5031.

New York defense lawyers and their noncitizen clients should stay tuned on the issue of whether New York youthful offender dispositions may be deemed convictions for immigration purposes. We anticipate that the BIA may soon issue a published precedent decision that would resolve the differences in outcome on this issue between the unpublished decisions of its various panels. Watch future issues of the *REPORT* for developments.

Recent developments on retroactivity of harsh 1996 immigration amendments

DOJ proposed regulations follow court decisions that found AEDPA restrictions on relief from deportation not applicable to some cases pending in 1996

The U.S. Department of Justice has published a proposed rule acquiescing in the decisions of several federal circuit courts, including the U.S. Court of Appeals for the 2nd Circuit here in New York, finding harsh rules of the Antiterrorism and Effective Death Penalty Act (AEDPA) not retroactive to some cases. The circuit court decisions—and the proposed rules—say that lawful permanent resident immigrants whose deportation cases were pending when the AEDPA was enacted on April 24, 1996 should still be permitted to pursue relief from deportation under former section 212(c) of the Immigration and Nationality Act, as it existed pre-AEDPA. 65 Fed Reg 44476-44481 (7/18/00). For a discussion of the 2nd Circuit’s decision in *Henderson v INS*, 157 F3d 106, *cert den sub nom Reno v Navas*, 526 U.S. 1004 (1999), see *Backup Center REPORT*, Vol XIV, #2, at p. 9 and Vol XIV, #3, at p. 6.

The proposed regulations would create a procedure allowing a lawful permanent resident to move to reopen deportation proceedings within 90 days of the effective date of the final rule, where an individual establishes that the individual:

- Had deportation proceedings before the Immigration Court commenced before 4/4/96;
- Is subject to a final order of deportation;
- Would presently be eligible to apply for section 212(c) as in effect on or before 4/23/96; and

—Either:

- (i) Applied for and was denied section 212(c) relief by the BIA solely on the basis of the 1997 decision of the Attorney General in *Matter of Soriano* (or its rationale);
- (ii) Applied for and was denied section 212(c) relief by the Immigration Court, did not appeal the denial to the BIA (or withdrew an appeal), and would have been eligible to apply for section 212(c) relief at the

time the deportation became final but for *Soriano* (or its rationale); or

- (iii) Did not apply for section 212(c) relief but would have been eligible to apply for such relief at the time the deportation order became final but for *Soriano* (or its rationale).

The time for written comments was extended from August 17, 2000 to September 1, 2000. NYSDA was working with other advocates to develop and submit comments at the time this went to press.

Federal judges rule that AEDPA and IIRIRA restrictions on relief from deportation are not applicable to cases not yet pending in 1996 but involving pre-1996 criminal conduct or convictions

The federal government continues to apply the 1996 immigration laws—AEDPA and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)—to deport without the possibility of relief lawful permanent resident immigrants convicted of crimes committed before the new laws took effect, where the INS had not initiated deportation proceedings prior to 1996. Several federal district judges in New York and Connecticut have issued additional decisions finding this retroactive application unlawful. See *Arias-Agramonte v Commissioner of INS*, 2000 WL 1059678 (SDNY 7/31/00) (Judge Sweet); *Santos-Gonzalez v Reno*, 93 FSupp2d 286 (EDNY 4/18/00) (Judge Sifton); *Zgombic v Farquharson*, 89 FSupp2d 220 (DCConn 3/22/00) (Judge Underhill); *Pena-Rosario et al v Reno*, 83 FSupp2d 349 (EDNY 2/22/00), *reconsid den* 2000 WL 620207 (EDNY 5/11/00) (Judge Gleason).

Meanwhile, this issue remains pending before the U.S. Court of Appeals for the 2nd Circuit in two separate groups of cases. The first group is *Pottinger v Reno*, *Maria v McElroy*, *Azcona v Reno*, and *Juin Yi Yu v Reno* (*amicus* brief filed by NYSDA and the National Association of Criminal Defense Lawyers, the National Legal Aid and Defender Association, the New York State Association of Criminal Defense Lawyers (NYSACDL), and the Legal Aid Society of the City of New York on March 16, 2000)—federal government appeals of a group of district court habeas corpus decisions and orders issued by U.S. District Judge Jack Weinstein finding that the AEDPA restrictions on lawful permanent resident eligibility for deportation relief should not be applied to deportation cases based on pre-AEDPA criminal conduct and convictions. See *Pottinger v Reno*, 51 FSupp2d 349 (EDNY 1999) and *Maria v McElroy*, 68 FSupp2d 206 (EDNY 1999), reported in the *Backup Center REPORT* Vol XIV, #7 at p. 6, and Vol XV, #2, at pp. 6-7.

The second group of cases is *Calcano-Martinez v Reno*, *Madrid v Reno*, and *Khan v Reno* (*amicus* brief filed by NYSDA and NYSACDL, and the Legal Aid Society of the City of New York on 11/12/99) and *St. Cyr. v INS*—challenges to government application of the AEDPA and IIRIRA elimination of lawful permanent resident eligibility for relief in removal cases based on pre-IIRIRA and pre-AEDPA criminal conduct and convictions. See *Backup Center REPORT* Vol XIV, #9, at p. 4.

(continued on page 23)

Fourth Department *continued*

Although at the time of the trial the officer was in a foreign country on personal business and his exact location was not known, the prosecution failed to make the required showing of due diligence in attempting to locate the officer. See *People v Arroyo*, 54 NY2d 567, 571 *cert den* 456 US 979. The prosecu-

tion did not attempt to find the witness or show that possibilities of producing him had been thoroughly investigated. *People v Broome*, 222 AD2d 1094. Because the prior testimony of the officer was the only evidence presented at the trial that placed the defendant at the scene of the crime, admission of the prior testimony was not harmless error. Judgment reversed, new trial granted. (Supreme Ct, Monroe Co [Mark, JJ]) ☞

Defender News

(continued from page 3)

Allegedly independent reviews were done of the laboratory evidence in those cases—and prosecutors then decided whether the results constituted information that had to be turned over to defense counsel. The press has reported that Frederic Whitehurst, the former FBI lab examiner who first disclosed problems at the lab, believes that the Justice Department “should have notified defense attorneys.” (Los Angeles Times [online] 8/17/00.)

Rampart Scandal Remains Under Scrutiny

In California, almost 100 wrongful convictions have already been overturned in the wake of a Los Angeles Police Department (LAPD) corruption scandal. That would be a high percentage of the initial estimate that 3,000 cases—the same number said to have been reviewed following the FBI scandal—would require review. However, that number has now grown to 20,000 or 30,000 cases. Michael Judge, head of the Los Angeles County Public Defender’s Office, told CNN (<http://www.cnn.com/2000/LAW/08/10/lapd.review/>) that 20 full-time lawyers are working on cases potentially tainted by corruption in the Rampart Division of the LAPD, costing taxpayers \$4.5 million a year. He said it will take “many years” to review the thousands of cases in question. The U.S. Justice Department is still investigating a pattern of police misconduct. (CNN.com, 8/10/00.)

NY Parole Scandal Yields A Conviction

No New York prisoner has successfully challenged a denial of parole on the basis that continuing allegations of parole-for-campaign corruption tainted parole panel decisions. (See Backup Center REPORT Vol XV, No 5.) But a busi-

nessman and political fundraiser caught up in the scandal could be on his way to prison. Yung Soo Yoo was convicted on July 28 of obstruction of justice. However, the jury was unable to reach a verdict on the counts directly charging Yoo with soliciting contributions for the governor’s 1994 campaign by promising parole for donors’ offspring in prison. Yoo is to be retried on those counts in September. Press accounts of his July trial indicated that a campaign aide to the governor is also under investigation in the matter. The governor has denied any knowledge of improper parole promises. (Daily News, Times Union, 7/29/00.)

Attica Lawyers Finalists for Trial Lawyer of the Year

It took a 26-year fight, but lawyers won an \$8 million settlement for over 1,200 Attica prisoners who were shot, beaten, and brutalized by prison guards after the 1971 inmate uprising over unsanitary and unsafe conditions. It is the largest settlement of a prisoners’ rights case in U.S. history. In recognition of their contribution to the public interest, the prisoners’ lawyers were among the finalists named by Trial Lawyers for Public Justice (TLPJ) for its prestigious 2000 Trial Lawyer of the Year award.

The lawyers include: NYSDA member Daniel Meyers, New York, NY; Elizabeth M. Fink of Brooklyn, NY; Joseph J. Heath, Syracuse, NY; Ellen M. Yacknin, Greater Upstate Law Project, Rochester, NY; Michael E. Deutsch, People’s Law Office, Chicago, IL; and Dennis Cunningham, San Francisco, CA.

The 2000 Trial Lawyer of the Year winner was the team of lawyers who prevailed in *Hartman v Albright*, the landmark gender discrimination class action against the U.S. Information Agency and the Voice of America. For more information, see the TLPJ web site at www.tlpj.org. ☞

Immigration Practice Tips

(continued from page 7)

2nd Circuit finds noncitizen deportable for pre-1988 aggravated felony conviction

The 2nd Circuit has found that an immigrant convicted of an aggravated felony prior to the Anti-Drug Abuse Act of 1988 (ADAA) is deportable even though the ADAA provided that the then new aggravated felony deportation ground applied only to individuals convicted on or after the statute’s enact-

ment on November 1, 1988. *Bell v Reno*, 218 F3d 86 (2d Cir 5/31/00). The Court found that the restriction on retroactive application of the aggravated felony deportation ground to pre-11/1/88 convictions was rendered obsolete by the Immigration Act of 1990 (IMMACT), which redesignated the aggravated felony deportation ground and included effective date provisions that the Court said applied to the aggravated felony deportation ground in its post-IMMACT form. See ADAA 7344(b); IMMACT 602(d). Petitioner Bell’s lawyers, the Legal Aid Society of the City of New York, plan to petition the Supreme Court for writ of certiorari. ☞